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No. 82-708

In the Supreme Court of the United States

OCTOBER TERM, 1982

SUMMA CORPORATION, PETITIONER

v.

STATE OF CALIFORNIA EX REL. STATE LANDS COMMISSION AND CITY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE URGING REVERSAL

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QUESTION PRESENTED

Whether the State of California today enjoys a pervasive "public trust" interest in tidelands embraced within a private Mexican grant on the ground that such an interest was reserved by Mexico, was withheld by the United States when it confirmed the grant, and inured to the State under the Equal Footing Doctrine.

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INTEREST OF THE UNITED STATES

On January 17, 1983, the Court invited the Solicitor General to express the views of the United States in this case. We responded in a Memorandum supporting the petition, and on March 21, 1983, the Court granted certiorari. Having submitted arguments in support of review and reversal that provoked strong dissent from the State of California at the petition stage, it seems appropriate to contribute a fuller presentation now that the Court has determined to give the case plenary consideration.

Even after more than a century, the United States cannot be indifferent to any substantial violation of its solemn treaty obligation to assure that private grants by the Republic of Mexico in California would be "inviolably respected." Treaty of Guadalupe Hidalgo, Feb.

2, 1848, art. VIII, 9 Stat. 929. Nor can we lightly ignore the impairment of patents issued by the United States after elaborate proceedings directed by Congress and undertaken by both the Judicial and Executive Branches of the national government. See Act of Mar. 3, 1851, ch. 41, 9 Stat. 631 *et seq.* These concerns alone justify our participation.

There is, moreover, a more immediate federal interest in the resolution of the case. The United States is today the owner of substantial acreage in California which has been acquired from Mexican grantees or their successors and, in many instances, these federal reservations embrace areas of present or former tidelands. To be sure, the State of California attempts to dismiss our apprehension that the decision below could be extended to such federal lands. See Br. in Opp. to U.S. Memo 14. But we are not clear whether the State is conceding that where the United States is the title owner of the tidelands, it may exclude the public. Or must the federal custodian respect the supposed public rights as "substitute administrator?" Can the national government, implementing constitutional powers, destroy the character of tidelands by filling or draining and building upon them? At all events, we surmise that California would insist that its public trust easement, even if in abeyance during federal ownership, revives in full vigor when the United States conveys the former tidelands—thereby seriously embarrassing the ability of the federal government to dispose of such lands.

STATEMENT

The present controversy concerns a small and very shallow tidal body of water south of Venice, California, a remnant of the substantially larger "Ballona Lagoon" connected—albeit circuitously—to the Pacific Ocean. See Pet. 3-5; Pet. App. A2, A36, A52-A53. It is common ground that the lands underlying the "lagoon" are privately owned and have been since they were included in

a Mexican grant in 1839, a grant confirmed by the United States, after elaborate proceedings under the Act of Mar. 3, 1851, ch. 41, 9 Stat. 631, by issuance of a patent encompassing the lagoon in 1873. See Pet. App. A2, A4, A5, A8. The City of Los Angeles and the State of California nevertheless asserted the right to dredge the lagoon, construct sea walls, make other improvements therein, and open it to public navigation, fishing and recreation, all without exercising the power of eminent domain, and instituted judicial proceedings in state court to vindicate these claims. Pet. App. A2, A3, A36-A37.

The California Superior Court sustained the respondents' position, primarily on the ground that the State enjoyed a "public trust easement" over the lands which included the rights asserted. Pet. App. A59. Additionally, the trial court concluded that the previous owners had "dedicated" the lands in question to public use. Pet. App. A60. Both holdings were reversed by the intermediate appellate court. Pet. App. A35, A45; 117 Cal. App. 3d 335, 172 Cal. Rptr. 619 (1981). But the California Supreme Court, with two Justices dissenting, set aside the intervening ruling and affirmed the trial court. Pet. App. A16, A34. The Supreme Court did not reach the "dedication" claim, resting its judgment solely on the "public trust" doctrine. Pet. App. A16.

The California Supreme Court's ruling depended on four principal steps, each treated as essential to the result: (1) when the Rancho La Ballona was conveyed to the original grantees in 1839, Mexico retained a "public trust" property interest in the tidelands area (Pet. App. A7-A9); (2) when the United States annexed California in 1848, it acquired this interest (Pet. App. A9-A11); (3) the easement was not relinquished to petitioner's predecessors by the issuance of a patent from the United States confirming their title (Pet. App. A11-A15); and (4) upon California's admission to the Union in 1850, the State succeeded to the "public trust" interest in the tidelands, where it remains today (Pet. App. A15).

ARGUMENT

Introduction and Summary

With this decision, the California Supreme Court appears enthusiastically to have embraced a new legal Renaissance, in which modern "humanists" rediscover old texts and invoke the distant past to liberate the spirit from the confining "shackles" of a more conventional era. But we are not witnessing Petrarch, mildly unorthodox in reviving Cicero, or Boccaccio retelling irreverent stories borrowed from Ovid. Here, the half-forgotten ancient models are the codes of the Emperor Justinian and Alfonso the Wise of Castille, the Magna Carta wrested from King John and the treatise of Henry de Bracton.[1] We may question whether such a revolution, not in literature or philosophy, but in the law of property, even on the claim of returning to an earlier wisdom, is equally to be applauded.

It is one thing for a modern legislature to exercise its police powers to restrict the uses of private property for the sake of what is perceived to be the overriding public interest. Such a change of direction is subject to familiar constitutional limitations on retrospective legislation, which, if transgressed, require the payment of compensation. A very different case is presented, however, when, as here, a court purports to impress a pervasive "public trust" easement on lands that had not been so encumbered, on the ground that such a servitude must be "assumed" to have been intended by the original grantor because venerable authorities and current policy converge in suggesting that result, albeit more than a century of contrary practice has intervened. We cannot join in this endeavor.

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[1] See, *e.g.*, Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. D. L. Rev. 195, 196-198 (1980), cited with apparent approval below. Pet. App. A1, A9 n.8. See also, Comment, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 Yale L.J. 762, 763-768 (1970).

A

Although it may be unnecessary, we first challenge the major premise of the court below: that the Mexican grant of the Rancho La Ballona, if it embraced the disputed tidelands at all, reserved for the benefit of the public (in the keeping of governmental authorities) a comprehensive servitude interest of the same character as California's modern "public trust" tidelands easement. We seek to dispel any lingering doubt concerning the inclusion of the lagoon within the original grant, briefly examining the Mexican documents, the available evidence as to the mid-Nineteenth Century geographical facts, and the then prevailing legal regime. Having satisfied ourselves that no mistake was made, we submit there is no basis for supposing that the Mexican government silently reserved an easement over the tidelands it granted out. If this is right, the case is at an end, since the court below did not suggest that, upon acquiring California, the United States withheld from the Mexican grantees any interest the former sovereign had conceded.

B

Next, we turn to the confirmation proceedings undertaken by the United States after the annexation of California. The prescribed procedure, and more, was followed here. Accordingly, under the settled jurisprudence of this Court, whatever was then finally determined is now foreclosed, whether the decision was right or wrong. Scrutiny of these proceedings leaves no room for doubting that, after full debate, the issue whether the disputed tidelands were properly included within the grant was firmly resolved in the affirmative. It remains only to answer the claim that, although unmentioned, a substantial interest in these lands was withheld. We invoke precedents in this Court to show that no such easement could have survived unnoticed.

C

Finally, we question whether, even if some interest in the tidelands escaped the confirmation proceedings, it must be deemed to have passed to the State of California. We notice the absence of any authority for that claim, especially as applied to marginal tidelands apparently not navigable at statehood. At the same time, we leave open the present status of the area under the federal navigational servitude and more recent State and national environmental legislation. In our view, those laws —not the "public trust" doctrine—control the future of the Ballona Lagoon.

A. The Mexican Grant Reserved No Interest From the Conveyance of the Tidelands Included in the Rancho

The decisions of this Court teach that once a Mexican grant in California has been confirmed by proceedings under the special legislation enacted by Congress in 1851, its scope has been defined by survey and a patent has been issued, it is unnecessary—indeed impermissible—to go back to investigate what the Mexican authorities meant to convey. See Point B, *infra*, pp. 17-27. Presumably, the only pretext for looking to the terms of the Mexican grant itself or the law of Mexico is to resolve some ambiguity in the decree of confirmation or the patent subsequently issued. *E.g.*, *Stewart* v. *United States*, 316 U.S. 354 (1942). In our view, this is not such a case, and, accordingly, we believe there is no need to go behind the confirmation proceedings.

Nevertheless, as we have seen, the California Supreme Court chose to rest its decision on the premise—indispensable to the result under that court's reasoning—that Mexico withheld a comprehensive servitude in conveying the tidelands encompassed within the rancho grant. Even if that inquiry was open, we think the answer given below is unfounded and impugns all that follows. Thus, al-

though other errors independently invalidate the judgment, we briefly address this threshold question.[2]

Our focus is restricted to the tidelands or wetlands area, variously labelled a "lagoon," an "inner bay," an "inlet," or an "estuary."[3] The court below somewhat grudgingly accepts respondents' concession that these tidelands were included within the grant (Pet. App. A7-A8, A9 n.9), but then takes back most of what was given by insisting that the former lagoon was (and remains) encumbered by a pervasive easement held by the State in trust for the public. We do not know whether this unusual result was informed by doubts as to the true scope of the Mexican grant or by a suspicion that the tidelands were conveyed by mistake, or worse. See Pet. App. A9 n.9.[4] If so, it may be relevant to show that

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[2] Notwithstanding suggestions to the contrary by respondents (Br. in Opp. 12-17), we deem it clear that, in the present setting, this Court may review the California Supreme Court's determination as to the scope of the Mexican grant of 1839. The court below did not invoke Mexican law as the law of California, but, rather as the source of a *federal* interest later granted to the State. At all events, we read the more recent cases in this Court as repudiating the proposition that construing a federal patent issued under the 1851 law is governed by the *State's* view of Mexican law and the scope of a Mexican grant. If, as we suppose, the initial effect of the federal confirmation proceedings and patent presents a question of federal law, it seems plain that when the answer depends upon determining the meaning of a foreign act in light of foreign law, that ancillary determination is properly undertaken by a federal court. See *United States* v. *Pink*, 315 U.S. 203, 217-218 (1942).

[3] By referring to the historic water body as a "lagoon" and the affected land area as "tidelands" here and elsewhere in this brief, we intend no legal characterization that brings into play the Equal Footing Doctrine. See, *infra*, pp. 27-28. In our view, however, the decision below is equally flawed if the effect of the tides on the area was sufficiently regular to justify the label "tidelands" rather than "wetlands."

[4] Indeed, the trial court, while apparently defining the State and public rights within the Ballona Lagoon as an "easement" (Conclusions of Law 1, 2 and 5, Pet. App. A50), also found that "while

respondents have not been improvident in conceding the inclusion of the lagoon. Once that is settled, no pretext remains for the superimposition of a "tidelands public trust" over privately-owned lands, a concept unknown to the law of Mexico—and never suggested with respect to Mexican grant tidelands even by California until the present case.

1. The documents evidencing the Mexican grant of 1839 are straightforward on their face. There is no meaningful description of the rancho in the original "espediente," consisting of the application, various orders of reference, the favorable recommendations of the City Council Committee on Unoccupied Lands, the Council itself, and the District Prefect, and, finally, the grant from the Governor of the Californias (J.A. 1-6). But the accompanying sketch map ("deseño") (J.A. 7) is tolerably clear in delineating the rough square of the rancho as embracing the Ballona Lagoon. Although its boundaries may not be fully traced, an "estuary" ("estero")[8] is noted for the same area as was later labelled "inner bay" and the principal channels are depicted. Color coding on the map apparently describes most of this portion of the grant as "grazing" land (see J.A. 32), suggesting very shallow wetlands of limited salinity. And, below the "estero," a barrier intervenes before we reach the lower boundary, shown as the coastal beach ("playa"). The subsequent record of juridical possession (J.A. 8-11) is consistent. The mouth of an "estero"—here translated

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subject to Mexican sovereignty, and under Mexican law, the grantees of said grant had no property interest in the lands known as the Ballona Lagoon." Finding 7, Pet. App. A54. Presumably, the Superior Court believed that the Board of Land Commissioners, the United States District Court and the federal Land Department had all been misled in confirming the grantees' title to the lagoon area.

[8] According to Dr. Anthony Orme, the Chairman of the Department of Geography at U.C.L.A. who was an expert witness for respondents at trial (see J.A. 126), the term "estero" especially connotes "a marshy estuary," and is "also used for the land adjoining estuaries inundated by the tide." J.A. 138.

"creek"—is mentioned. J.A. 10. And, significantly, the parcel is described by metes and bounds, unambiguously delimited by the "sea-coast" (J.A. 11), with no portion excepted.[6]

To be sure, in the subsequent confirmation proceedings, neighboring landowners disputed the true boundaries of the Rancho Ballona. As we detail in a moment (*infra*, pp. 17-22), it was once suggested that the so-called "inner bay" was outside the grant (see J.A. 32-34). But that challenge was firmly rejected on the basis of both internal and extrinsic evidence—including affidavits to the effect that most of the area apparently depicted as submerged in the 1858 survey was in fact used as pasturage (J.A. 84, 92). And, at the end of the day—as respondents now accept—it is perfectly clear that the Mexican grant encompassed the disputed "inner bay."

2. There is nothing surprising about this result once we appreciate the character of the tidelands involved. Whatever the exact geography of Ballona Lagoon in the mid-Nineteenth Century, it was not the large unobstructed "inner bay," directly opening to the ocean, that seems to be pictured on the Hancock survey of 1858 (J.A. 26). That false description was expressly repudiated a few years later by the Surveyor-General for California (J.A. 110-112), the Commissioner of the Land Office (J.A. 84-94, at 92), and the Secretary of the Interior (J.A. 100). See, *infra*, pp. 21-22. And Hancock's delineation of the "bay" was dismissed by respondents' expert in the trial below as an "extremely poor," "purely stylized" sketch, "drawn in undoubtedly * * * by eye," not by actual plotting.

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[6] So, also, in further Mexican proceedings relating to the boundaries of the grant in 1840 (J.A. 12-18), five witnesses begin the lower limit at "the mouth of the estuary" and proceed to "the hallows" (presumably the "deep gullies" mentioned in the other documents; J.A. 11, 19, 22). J.A. 13, 14, 15, 16, 17. Two of the witnesses expressly describe this course as being "along the shore." J.A. 13, 16. Again, the seacoast appears to bound the grant, encompassing the inland lagoon. (To understand the descriptions, one must correct all the compass directions by some 90 degrees, reading "southerly" to mean "westerly," etc.)

J.A. 170.[7] We accept that expert's opinion (J.A. 145-146, 171-172) that the most reliable depiction of the mid-Nineteenth Century lagoon is the United States Coast Survey map of 1876 (J.A. 122), which shows almost nine-tenths of Hancock's "inner bay" as salt marsh and mud flats (see J.A. 144-145), even part firm upland, and only relatively small water pools with a narrow and very circuitous connection to the sea.[8] So, also, that expert described the lagoon as a "shallow" area (J.A. 137-138, 164, 167), regularly encumbered by river silt (J.A. 139, 164-167), occasionally cut off entirely from the ocean (J.A. 139-140, 142, 166-167, 175-176), and more influenced by draining river outflow than incoming salt water (J.A. 142-143, 167). See, also, Tr. 187-188 (Carroll Richards). In sum, we deal with a changeable area of overflow, only partly tidal, with no suggestion that it was a navigable waterway.[9]

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[7] Because the lagoon itself was not excluded, the surveyor had no occasion to meander the contours of the water body, nor to depict any portions of it that would more accurately be described as marshland. Similarly, he did not trace the channel leading to the ocean since it was deemed outside the grant.

[8] In an appendix to this brief, we have superimposed the outline of the "inner bay" drawn on the Hancock survey of 1858 over the 1876 Coastal Survey map.

Respondents' expert, Dr. Orme, surmised that the prevalent tufted symbolism represents salt marsh, while the stippling covering the enclosed areas at the right of the map depict mud flats. J.A. 144-145. This jibes with the indications given in 2 A. Shalowitz, *Shore and Sea Boundaries* 188-202 (1964). It is obvious that all the area surrounding the marsh is upland, except at the bottom of the map, where a water channel intervenes before the barrier beach and the sea. We should note that all solid lines indicate boundaries at high water, while the dotted lines show the low water line. *Id.* at 189-191. Thus, it appears that the larger lagoons depicted at the bottom center of the map were reduced to very narrow channels at low water.

[9] Our description is not at odds with any surviving finding of fact below. The Superior Court found (Finding 1, Pet. App. A52) that Ballona Lagoon was (and is) "an arm of the sea * * * subject

It is true that, under Spanish law in force in Mexico, the "sea and its shores" were, in principle, held in common for the benefit of the public and not susceptible of private ownership. Las Siete Partidas, pt. 3, tit. 28, law 3 (J.A. 120). And the "seashore" was defined as embracing "all that space of ground covered by the waters of the sea in their highest annual swells." *Id.*, law 4. No doubt, this rule extended to true bays, harbors, and other navigable "arms of the sea." See *id.*, law 6 (J.A. 121). But it does not follow that the same prohibition on alienation applied to very shallow areas which, although affected by the tide, were substantially disconnected from the open sea and served no significant public uses, navigational or other. It is, after all, common sense that abstract principles ought not be pressed beyond the point where the reason for the rule ceases to support it.

At all events, we know that in territories governed by the law of Spain there was, in practice, no inflexible precept that lands permanently or periodically covered by tidal waters may never be granted in private ownership. As this Court had occasion to notice in a case involving a grant of tidelands during the Spanish pos-

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to the tides of the Pacific Ocean and inundated with seawaters at mean low-tide and mean high-tide," and that it is today "a navigable body of water." See, also, Finding 7, Pet. App. A53-A54. But there is no finding that the lagoon was navigable at the time of the original grant of 1839, the survey of 1858 or the patent of 1873. Present navigability—limited as it is—may well be the result of dredging. See Finding 2, Pet. App. A52. At all events, it is not clear that all these findings survived appeal. The California Court of Appeal apparently accepted the Land Office Commissioner's conclusion that the "inner bay" was not "an arm of the sea" and the evidence of witnesses that the area constituted "pasture land which was periodically flooded by fresh water." Pet. App. A38. The California Supreme Court, after reciting the Commissioner's conclusion (Pet. App. A6), went on to approve the trial court's action in receiving evidence and its finding that, at all relevant times, "the lagoon has been an arm of the sea, subject to the tides." Pet. App. A7. Accepting that determination in no way contradicts the description we have given.

session of the Philippine Islands, the Supreme Judicial Tribunal of Spain ruled in 1863 that the general principle announced in Las Siete Partidas "is not to be taken in an absolutely literal manner" and that, indeed, in appropriate circumstances, the government "may grant shore land for improvement." *Jover* v. *Insular Government*, 221 U.S. 623, 629 (1911). The same approach was obviously followed by Mexico in California, witness the many decisions of this Court confirming private tidelands grants, all more arguably resulted by the Partidas rule than our case. *E.g.*, *San Francisco* v. *Le Roy*, 138 U.S. 656, 670-671 (1891); *Knight* v. *United States Land Association*, 142 U.S. 161, 183-184 (1891); *United States* v. *Coronado Beach Co.*, 255 U.S. 472 (1921); *United States* v. *O'Donnell*, 303 U.S. 501 (1938). See also *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 15, 19-21 (1935).[10]

It is far too late in the day to rewrite history by pretending that the government of Mexico, any more than others before and since,[11] always hued exactly to the sup-

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[10] Signor Laffan, the Mexican law expert cited by the court below (Pet. App. A9 & n.9), noted that one of the ordinances of the Viceroy of the Indies prescribing the procedure for "juridical possession" of a grant instructed the officer undertaking the physical survey to exclude "large lagoons." J.A. 217-218. Although the witness seemed to frown on the departure from the strict principle of Las Siete Partidas, he construed this "Rule 8" as permitting the conveyance of non-navigable lagoons or those wholly enclosed within the boundaries of the grant. J.A. 219-220. Obviously, the Viceroys of New Spain and the Governors of California during the Mexican regime were less fastidious than the modern historian.

[11] At the same time as Las Siete Partidas, Bracton was likewise declaring the shores of the sea to be "common to all" and "inalienable." 2 Bracton, *On the Laws and Customs of England* 16-17, 39-40 (S. Thorne trans. 1968). Yet, in the Seventeenth Century Lord Chief Justice Hale demonstrated that absolute grants of tidelands bordering the sea and its arms had been made since at least the time of Edward the Confessor, and, accordingly, he announced the law to be that the seashore only belonged *prima facie* to the Crown for the benefit of the public. *De Jure Maris*, chs. 4 and 5. In fact, the

posed line announced in a Thirteenth Century Code that in many respects reflected an idealized legal regime rather than current reality.[12] One should perhaps resolve ambiguities by presuming strict adherence to the theoretical rule. But when, as in this instance, it is firmly established that tidelands were granted out—whether this was an exception or common practice—there is no justification for being grudging in conceding the fact and denying the natural consequences. In our view, the California Supreme Court was wholly out of bounds in attempting to "correct," a century and a half later, what it thought an unfortunate deviation from the true model, producing a result at odds with its notion of sound "policy." See Pet. App. A15.

3. The only textual basis for construing the Mexican grant of 1839 as reserving for the benefit of the public an interest in the tidelands conveyed is the stipulation that the grantees "may enclose [the described rancho] without prejudice to the traversing roads and servitudes." See Pet. App. A9. This is a slender reed, indeed. The quoted language is boiler-plate which tells us nothing about whether any roads actually traversed the Rancho Ballona or whether any other servitudes attached to the tract. Nor is it even clear that the proviso invoked is addressed to *public* rights. Significantly, the term "servidumbre" (servitude) is used in Las Siete Partidas only in describing rights or easements owed by one private estate to another (pt. 3, tit. 31)—including various

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English courts have always recognized the validity of tideland grants and even private grants of seabed. *E.g.*, *Attorney General* v. *Emerson*, [1891] A.C. 649; *Foreman* v. *Whitstable Free Fishers*, L.R. 4 H.L. 266 (1869). So, also, even in its landmark decision on the inalienability of navigable water bottoms, this Court approved an exception for "grants of parcels which * * * do not substantially impair the public interest in the lands and waters remaining." *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387, 452, 453 (1892). See also, *Appleby* v. *City of New York*, 271 U.S. 364 (1926).

[12] Indeed, the provisions of Las Siete Partidas dealing with the seashore are obviously borrowed, almost verbatim, from the mid-Sixth Century laws of Justinian. See *Institutes* 2.1.1-6.

rights of way for the passage of persons or vehicles (law 3) or the conveyance of water (law 4), the right of taking water (law 5) or watering animals (law 6), or the privilege of removing clay or sand or stone (law 7).[13] At all events, this Court has explicitly rejected the suggestion that the standard caveat just quoted diminishes an express grant of tidelands. *United States* v. *Coronado, supra*, 255 U.S. at 485-486. See also *Barker* v. *Harvey*, 181 U.S. 481, 498-499 (1901).

Nor does anything cited in Mexican law support the assertion that a public servitude over tidelands conveyed as part of a rancho must be implied, even though not expressly reserved. On the contrary, the court below conceded that it was "not aware of any authority on the question whether a conveyance of tidelands by Mexico (perhaps erroneously) preserved the public's right in the land," but simply "assume[d]" such a rule. Pet. App. A9 n.9. That seems to us a wholly inadequate basis for destroying the value of an apparently unrestricted grant. If presumptions are to be indulged, the rule is that agents of the prior government must be supposed to have enjoyed authority to make the complete conveyance they apparently effected. *Thompson* v. *Los Angeles Farming & Milling Co.*, 180 U.S. 72, 79 (1901); *More* v. *Steinbach*, 127 U.S. 70, 84 (1888).

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[13] The equivocal opinion of the Mexican law expert invoked by the court below (Pet. App. A9) lends no support to respondents' argument. On the one hand, he suggested that the reservation of "servidumbre" intended to preserve "public rights"—albeit the only example given was "expressly constituted rights of traverse on this land" (J.A. 222), not a public easement impliedly imposed by law. Significantly, the witness confessed unfamiliarity with the law of Las Siete Partidas "with regard to servitudes" (J.A. 221-222) and he expressly declined to say whether "a servitude in Mexican law [could] apply to the waters affected by the tides." J.A. 222-223. But, he insisted that Mexico never granted out "a body of water subject to public uses." J.A. 223; see, also, J.A. 220, 221. The upshot is that the witness cannot be invoked to support the proposition that the quoted words of the grant effected the reservation of a *tidelands public trust interest*, a non sequitur in his view, but the only relevant issue here.

There are, moreover, indications that Mexico intended to hold nothing back. We have already noted the decision in *Jover* v. *Insular Government*, *supra*, where this Court confirmed a grant of tidelands with a view to the area being filled and reclaimed, thereby obviously terminating any public access for navigation or fishing. Although that case involved the Spanish regime in the Philippines, the governing law was Las Siete Partidas, the same Code invoked here as imposing a perpetual easement on the tidelands area encompassed in the Ballona Rancho grant. We reasonably may suppose that Mexico construed that provision no differently. What is more, it is common ground that most of the former "inner bay" pictured in this case has long since been filled in and built upon or otherwise appropriated to private use. See Amicus Brief of California Land Title Association, at Exh. 2. We ought not lightly conclude that all this was done in derogation of public rights recognized by Mexican law and continuing in force to this day under the ruling below.

In sum, once it is conceded that the tidelands at stake here were conveyed as private land, there remains no firm basis for concluding that Mexico retained a pervasive easement over the area that required the owner to dedicate it to the public in perpetuity. Common sense tells us otherwise. Especially in the mid-Nineteenth Century, when current ecological and environmental concerns were not yet at the fore, why would a government insist on preservation of barely accessible wetlands that were granted out presumably because they served no public purpose? Whatever may be assumed in respect of subsisting public rights over the shore of the open sea or harbors, or the banks of tidal and other navigable rivers or lakes serving as arteries of commerce, it is extravagant to suppose that the Ballona Lagoon was tacitly preserved for public use after it was included in a private grant. Taking that stance, it seems to us, is to be "more Roman than the Romans."

4. If the submission just made is correct, the entire rationale of the decision below collapses. Indeed, it is not pretended that a Mexican grant conveying unencumbered title to tidelands was whittled down by the United States (for the ultimate benefit of the State of California) by subtracting a critical incident of ownership that Mexico did not reserve. That would seem to be prohibited by the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 929, which in Article VIII (Pet. App. A96) expressly promised that vested property rights would be "inviolably respected," [14] and by the Act of Mar. 3, 1851, which in Section 11 (Pet. App. A111) required the United States to confirm Mexican grants in California in accordance with "the treaty of Guadalupe Hidalgo, the law of nations, [and] the laws, usages, and customs of the government from which the claim is derived."

Nor did the Equal Footing Doctrine authorize such a result, for it is well settled that tidelands already alienated by a previous government—most notably those covered by Mexican grants in California—must be exempted from the normal rule. *E.g.*, *San Francisco* v. *Le Roy*, *supra*, 138 U.S. at 670-671; *Knight* v. *United States Land Association*, *supra*, 142 U.S. at 183-184; *United States* v. *Coronado Beach Co.*, *supra*, 255 U.S. at 487-488; *Borax, Ltd.* v. *Los Angeles*, *supra*, 296 U.S. at 15, 19-21. See also Point C, *infra*, pp. 27-28. And, in any event, whether or not permissible, the California Supreme Court

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[14] We deem frivolous the suggestion by the court below (Pet. App. A16), repeated by respondents (Cal. Br. in Opp. 7; Br. in Opp. to U.S. Memo. 3-4), that Article VIII of the Treaty of Guadalupe Hidalgo meant to *deprive* previous grantees of some part of their interest by promising that they should "enjoy with respect to [their property] guaranties equally ample as if the same belonged to citizens of the United States." See Pet. App. A96. This is obviously a nondiscrimination clause and nothing more. Indeed, if, before annexation, a United States citizen had purchased a Mexican rancho, this clause could not be invoked to diminish his rights. Accordingly, it can have no such effect as against the original Mexican grantee or his heirs.

did not suggest that any rights conceded by Mexico to the grantees were withheld from them by the confirmation decree or patent subsequently awarded by the United States.

B. No Public Trust Easement Over Tidelands Embraced by the Mexican Grant Survived the Confirmation Proceedings and the Patent Issued by the United States

We have shown that, when it included the lagoon within the Rancho Ballona grant, Mexico reserved no public servitude over the area. But, were the question of Mexico's intent in some doubt, the result would be no different. That is so because, whether right or wrong, the decision made on the validity and content of the Mexican grant at the conclusion of the confirmation proceedings undertaken by the United States is conclusive, and because the documents evidencing that determination leave no room for the contention that the trust interest now claimed by California slipped through those elaborate proceedings unnoticed and unadjudicated.

1. It is not debatable that the central purpose of the Act of Mar. 3, 1851 (Pet. App. A108-A114) was to settle, with finality, the boundaries of prior Spanish and Mexican grants within the recently annexed territory of California. Unlike schemes earlier adopted for Louisiana and Florida,[15] Congress determined, in the case of California, to require all claimants, whether their grants were "perfected" or "unperfected," to submit applications for confirmation to a Board of Land Commissioners. Section 8, Pet. App. A109. Judicial review of the Board's decision was provided for, first to the district court, then to this Court. Sections 9 and 10, Pet. App. A110-A111.[16] If the

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[15] See, *e.g.*, Louisiana: Act of Mar. 2, 1805, ch. 26, 2 Stat. 324; Act of Apr. 12, 1814, ch. 52, 3 Stat. 121; Florida: Act of May 8, 1822, ch. 129, 3 Stat. 709; Act of Mar. 3, 1823, ch. 29, 3 Stat. 754; Act of May 23, 1828, ch. 70, 4 Stat. 284.

[16] By Section 12 of the Appropriation Act of Aug. 31, 1852, ch. 108, 10 Stat. 99, the appeal to the District Court was made automatic, albeit the appeal would be dismissed if both the claimant

claim survived this examination, the Department of the Interior was required to undertake a survey of the land. Section 13, Pet. App. A111-A112.[17] And, ultimately, the President would issue a patent in the name of the United States. *Ibid.* Once the process was completed, the determination was expressly declared "conclusive," at least between the claimant and the United States. Section 15, Pet. App. A113.[18]

Here, the full procedure—and more—was carried out. The Commissioners confirmed the Rancho La Ballona grant. J.A. 21. The district court upheld the Board's decision (J.A. 22) and an appeal to this Court was dismissed. J.A. 24. A survey was then made (J.A. 26). Although initially questioned (J.A. 32), the boundaries described in the survey were ultimately approved, both by the Commissioner of the General Land Office (J.A. 84) and the Secretary of the Interior. J.A. 100. And a formal patent, reciting the same boundaries in detail, was finally issued. J.A. 101. It follows, as one would expect, that whatever was determined by these confirmation proceedings and the patent issued is now foreclosed,

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and the United States failed to prosecute. After 1864, the second appeal went to the Circuit Court, rather than this Court. Act of July 1, 1864, ch. 194, Section 3, 13 Stat. 333; Act of July 23, 1866, ch. 219, Section 9, 14 Stat. 221.

[17] From 1860, notice of such surveys was required to be published in local newspapers and, for a time, the district courts were given jurisdiction to entertain objections to the survey by "any party interested." Act of July 14, 1860, ch. 128, Section 2, 12 Stat. 33. The 1864 Act, *supra*, transferred this review function to the Commissioner of the Land Office in Washington, who was required to entertain objections to the survey "by any party claiming to have an interest in the tract embraced by the survey." This latter procedure was followed in the present case. See J.A. 37, 38.

[18] Although the 1851 Act stipulated that the patent issued "shall not affect the interests of [illegible]d parties," the breadth of this proviso was presumably diminished as to contesting intervenors who submitted objections to the underlying survey under the 1860 and 1864 legislation. See, *supra*, note 17.

whether or not the decision correctly construed the original grant from Mexico. So much is firmly established by a long line of precedents in this Court. *E.g.*, *United States* v. *O'Donnell*, *supra*, 303 U.S. at 512-514; *United States* v. *Title Insurance Co.*, *supra*, 265 U.S. at 483-486; *United States* v. *Coronado Beach Co.*, *supra*, 255 U.S. at 487-488; *Thompson* v. *Los Angeles Farming & Milling Co.*, *supra*, 180 U.S. at 77; *Knight* v. *United States Land Association*, *supra*, 142 U.S. at 182-189; *San Francisco* v. *Le Roy*, *supra*, 138 U.S. at 672; *Beard* v. *Federy*, 70 U.S. (3 Wall.) 478, 489 (1865). And it is equally well settled that this principle applies to any interest asserted by the State or its grantees which, as here, derives from the United States. *United States* v. *Coronado Beach Co.*, *supra*, 255 U.S. at 488; *Knight* v. *United States Land Association*, *supra*, 142 U.S. at 183-184; *San Francisco* v. *Le Roy*, *supra*, 138 U.S. at 670-671.[19]

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[19] *New Orleans* v. *United States*, 35 U.S. (10 Pet.) 662 (1836), is not to the contrary. To be sure, the Court there held that New Orleans was not barred from asserting public rights in riverfront lands notwithstanding the earlier rejection of the City's claim by a Board of Commissioners established under the Act of Mar. 2, 1805, *supra*. 35 U.S. (10 Pet.) at 733-734. But the critical distinction is that the Board established by that legislation—unlike here—merely made recommendations to Congress, which, absent congressional action, lacked legal force or effect. Thus, as with the comparable scheme established for Florida, the Board's rejection of a claim did not amount to a forfeiture of title. See *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51, 90-95 (1833); *New Orleans* v. *United States*, *supra*, 35 U.S. (10 Pet.) at 736. See also *Block* v. *North Dakota*, No. 81-2337 (May 2, 1983), slip op. 15-16 n.25.

Nor can respondents derive much comfort from *Eldridge* v. *Trezevant*, 160 U.S. 452 (1896). That case did not involve a confirmatory patent, as we have here, but an outright grant from the United States. Indeed, the grantee sought exemption from the traditional levee easement because his title was not "derived by grant from Spain or France, or from the State * * * [but] from the United States." *Id.* at 466. See also *id.* at 468. Thus, *Eldridge* holds no more than that a federal patent granting land owned by the United States did not nullify a limited servitude for the construction of levees for the public safety which had long before been announced in the local laws as applicable to lands bordering the Mississippi

Thus, the only issue now open is whether the tidelands easement claimed by respondents was left unadjudicated in the proceedings confirming the Ballona grant. This is a novel question only because, until the present case, neither California nor any member of the public had thought to assert such a servitude over privately owned tidelands embraced within a Mexican grant. In the several like controversies reaching this Court—*Le Roy*, *Knight*, *Coronado Beach Co.*, *O'Donnell* and *Stewart*, all previously cited—the only issue litigated was title to the tidelands. Indeed, it may be doubted if those cases would have been pursued so far had it been appreciated that the prevailing party must in any event concede a pervasive easement over the property that denied him the practical benefit of his victory. But, however strained the question, we must attempt an answer.

1. Once again, it is appropriate to stress that there is nothing equivocal about the confirmation of the Mexican grantees' title to the tidelands in suit. Both the decision of the Board of Commissioners (J.A. 21) and the decree of the District Court (J.A. 22) expressly fix the southwestern boundary of the grant as "the Sea Coast," excepting nothing, and therefore plainly include the lagoon as part of the Rancho. Even more explicit are the survey of 1858 (J.A. 26), the underlying field notes (J.A. 27), and the patent of 1873 (J.A. 101)—which recites the field notes. In each document, the lagoon, called "inner

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River and other rivers subject to overflow. As this Court noted, the rule was "explicitly asserted in the Civil Code of Louisiana." *Id.* at 463. In fact, the same provision was included in the Digest of the Civil Laws Now in Force in the Territory of Orleans, approved by the Territorial Legislature and Governor Claiborne in 1808 (see Act of Mar. 31, 1808, Acts of the Terr. of Orleans, 2d Leg., 1st Sess., ch. 29, 120-128), and commonly known as the "Civil Code of 1808." See 16 West's LSA-C.C. 407 (1972). It was carried forward in the Civil Code of 1825 (Art. 661) and the Revised Civil Code of 1870 (Art. 665). *Ibid.* In these circumstances, the Court deemed it appropriate to construe a patent issued after the Louisiana Purchase (and presumably after 1808) as subordinating the estate granted to the then established levee servitude.

bay," is depicted or described, but not meandered, as it would be if meant to be excluded.

This is more than enough. But, in fact, we know that the question whether the tidelands area should be excluded was not inadvertently overlooked. On the contrary, that issue was much debated, over a dozen years. The status of the lagoon was initially raised in 1860 by the Commissioner of the Land Office who declined to approve the Hancock survey of 1858 largely on the ground that the "inner bay" shown there ought to be wholly excluded and its northern shore deemed the southern boundary of the property. J.A. 33. It appears the Commissioner was misled by the label given the water body and the false depiction of it as a large, unobstructed arm of the sea apparently directly connected to the ocean.[20] At all events, the Commissioner's action encouraged the owners of the adjoining rancho on the west to dispute the surveyed boundary on that side (J.A. 39-49, 50-55, 95-99), eventually adopting the Commissioner's view that the southern boundary of the Rancho Ballona ought to follow the shore of the lagoon, rather than the sea coast, thereby pulling back the western limit. See J.A. 96-99.[21] For their part, the Ballona owners argued for retaining the seacoast boundary (J.A. 63-69), submitting a number of affidavits denying the description of the lagoon as an arm of the sea. J.A. 55, 58, 60, 70, 72, 73. The Surveyor-General for California returned the matter to Washington (J.A. 110-112),[22] suggesting no need for a new survey.

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[20] As we have noted (*supra*, note 7), deeming the "inner bay" within the outer boundaries of the grant and included, the surveyor had no occasion to plot this feature or delimit it with accuracy.

[21] It is noteworthy, nevertheless, that, at one stage, attorneys for the contestants felt bound to accept the sea coast as the southern boundary because, however erroneous, that limit was recited in the Mexican act of juridical possession, followed by the final decree of the District Court, and, accordingly, had become "the law of the case." J.A. 52.

[22] Although dated "Dec. 18th 1873," it is obvious that this communication preceded the Commissioner's decision of April 30, 1873

As for the so-called "inner bay," he deemed it properly included, describing it as "formed by the waters of the Ballona Creek and * * * increased or diminished in extent as the outlet of the same to the sea is more or less choked by the beach sands" (J.A. 111). In 1873, after still further argument (J.A. 76-83), the then Commissioner accepted these representations, repudiated his predecessor's ruling, and approved the 1858 survey boundaries encompassing the lagoon—which he expressly concluded was not an "arm of the sea." J.A. 84-94, especially at 92. The owners of the neighboring rancho appealed to the Secretary, once again arguing for retracing the boundaries of the Ballona grant by following the northern shore of the lagoon and excluding it. J.A. 95-99. But the Secretary upheld the Commissioner's determination, concluding that "the weight of evidence establishes the correctness of the survey [of 1858]." J.A. 100.

In light of this special focus on the hotly contested issue of the so-called "inner bay," it is impossible to entertain any doubt concerning its final resolution. The matter was very deliberately decided in favor of including the lagoon after more than full adversary proceedings. Nor is there any lingering "ambiguity" because the survey, giving a false image of the lagoon, was not revised. The survey was approved for its plotted boundaries, not the irrelevant sketch of an internal feature. Indeed, we cannot appreciate how the court below saw any contradiction between approval of the survey—whose only function was to fix the boundaries of the grant—and the determination that the lagoon was not an "arm of the sea." See Pet. App. A6-A7. But, however that may be, there is certainly no pretext for diminishing the effect of the patent embracing the tidelands area on the ground that its inclusion was an oversight.

2. It remains to rebut the suggestion that, if bare title to the tidelands must be conceded to the Mexican

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(J.A. 84). Probably, the Surveyor-General's letter should be dated 1872.

grantees and their successors, the confirmation proceedings and the patent did not touch the public easement attaching to these lands (assuming Mexico had withheld such an interest).

Of course, no one contends that the patent issued by the United States, or anything that went before, immunized the tidelands—or any other lands encompassed within the confirmed grant—from the *governmental* authority of the United States or the State of California. See Point C, *infra*, pp. 28-30. But, as we understand the decisions of the California Supreme Court, the public trust interest recognized is a servitude existing independent of any exercise of the police power, which can be asserted by any interested citizen, if need be, *against* the attempt by governmental authority to relinquish it. See, *e.g.*, *Marks* v. *Whitney*, 6 Cal. 3d 251, 261-262, 491 P.2d 374, 381-382, 98 Cal. Rptr. 790, 797-798 (1971). In sum, what is claimed is a substantial reserved interest, a pervasive easement or servitude significantly encumbering the normal incidents of ownership. It is in that light that we must consider whether such an interest survived the federal confirmation proceedings.

a. The first observation to be made is how extraordinary it is that, during all the proceedings from the application to the Board of Commissioners in October 1852 (J.A. 19) to the issuance of the patent in December 1873 (J.A. 101), neither the United States nor the State of California claimed any interest in the tidelands area. Since, in principle, what was being determined was the status of the Mexican grant as of the date of annexation (1848), the United States had a duty to assert any adverse claim of the federal government derived from Mexico. On the other hand, the new State, admitted in 1850, well before the confirmation proceedings began, had an obvious concern in putting forward—or urging the United States on its behalf to assert—an interest of such magnitude.[25] The federal government department with special

[25] Under Section 3 of the 1860 Act, *supra*, those claiming any "right or title derived from the United States" were not entitled to

responsibility for land matters, itself conducting the proceedings, had ample opportunity to interpose its claim. Nor can we suppose that the State authorities were unaware of what was at issue.[24] Yet, neither government made the slightest effort to protect this supposed public trust easement.

b. The only possible reply is that the kind of interest asserted was inappropriate for recognition in the proceedings conducted under the 1851 Act or for explicit mention in the patent ultimately issued. But any such contention is foreclosed by decisions of this Court.

It is certainly not maintainable that the tidelands easement now claimed was left untouched by the confirmation proceedings because it is a "sovereign right," rather than a private property interest. The guiding purpose of the Act of 1851 was to identify the extent of the public domain by settling private land claims. As to all lands, or interests in land, not previously conveyed, the United States retained full proprietary powers. It could withdraw such areas for special purposes, open them to settlement, or cede them to the State. To be sure, by the date of the confirmation proceedings, California had been admitted and the United States had already granted some character of lands to the State, whether the beds of navigable water bodies under the Equal Footing Doctrine or swamp and overflowed lands under the Act of Sept. 28, 1850, ch. 84, 9 Stat. 519. But that did not withdraw such interests from the procedure established under the 1851 legislation. On the contrary, the State's potential claim,

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intervene in the district court, but were permitted to "aid" the United States Attorney in representing their interest through separate counsel. After 1864, however, it appears that California was wholly free to interpose its claim before the Land Commissioner. See Act of July 1, 1864, *supra*.

[24] As we have noted (*supra*, note 17), from 1860, surveys were required to be advertised and made available for inspection. The survey of the Rancho La Ballona was in fact advertised in 1860 (see J.A. 35) and re-advertised under the 1864 Act. See J.A. 37, 38.

derived from the United States, made it especially appropriate to determine what, if any, interest the federal government had to give. See *United States* v. *O'Donnell*, *supra*, 303 U.S. at 509-513. And the decision rendered on that score was conclusive, equally against the State and its grantees as against the United States itself. *Id.* at 512-513. See also, *supra*, p. 19.

c. There is no greater merit in the suggestion that any interest less than full title was beyond the scope of the confirmation proceedings envisaged by the 1851 Act. Again, the decisions of this Court firmly reject that proposition.

We may readily assume that neither the Board of Land Commissioners nor the United States Land Office was concerned to identify mortgage liens, remainder interests, or private rights of way encumbering the property. So, also, in an early case, this Court stated that confirmation of the grant to a pueblo need not expressly recite the beneficial interest of individual lot holders or other inhabitants of the city. *Townsend* v. *Greeley*, 72 U.S. (5 Wall.) 326, 335 (1866).[26] The examples given merely implement the caveat in Section 15 of the 1851 Act (Pet.

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[26] In fact, the language invoked from *Townsend* (Calif. Br. in Opp. 19-20) was gratuitous dictum since the decree of confirmation entered by the Circuit Court (per Mr. Justice Field, sitting as Circuit Judge) on direct appeal from the Board's decision explicitly stipulated:

> This confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town or city of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city.

See 72 U.S. (5 Wall.) at 337; *San Francisco* v. *Le Roy*, *supra*, 138 U.S. at 662 n.1, 665-666, 667. At all events, Section 14 of the Act of Mar. 3, 1851, expressly provided for a "wholesale" confirmation in the case of Spanish or Mexican grants to pueblos. Pet. App. A112-A113.

Moreover, the beneficial interest in *Townsend* was not alleged to have derived from the United States. On that ground alone, it must be distinguished from the public trust easement vindicated here.

App. A113) that proceedings thereunder should not prejudice the rights of "third persons." But that is not our case, in which the claim is said to derive from the United States, whose interests were expressly subjected to "conclusive" determination. *Ibid.*[26]

Moreover, even with respect to non-governmental claims which, if sustained, would seriously embarrass the rights of the grantee, the Court more recently has held that they must be submitted or deemed abandoned. Thus, in *Barker* v. *Harvey, supra*, it was ruled that the Indians' right of occupancy in Mexican grant lands was terminated when not presented in patent proceedings and not expressly reserved in the decision. As the Court said (181 U.S. at 492):

> Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy.

That ruling was expressly re-affirmed a quarter century later, despite the plea of the United States for reconsideration. *United States* v. *Title Insurance Co.*, 265 U.S. 472 (1924).

The analogy with the present case is obvious. Here, as there, the claim asserted would impose a perpetual easement which largely destroys the value of the affected land. In both situations the United States presumably should have advanced the interest, if indeed it existed, as "trustee" for another, whether the Indians or the State. Yet, in the cited precedents, the Court held the Indians barred. It can hardly be just to accord more favorable treatment to California, whose default is less excusable.

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[26] It was once suggested that confirmation proceedings under the 1851 Act could not determine whether minerals had been reserved from a Mexican grant for the benefit of the government. *Fremont* v. *United States*, 58 U.S. (17 How.) 541, 565 (1854). But the Court effectively overruled that decision a few years later. *United States* v. *Castillero*, 67 U.S. (2 Black) 17, 166-169 (1862).

In sum, if (contrary to our submission) the kind of pervasive public trust easement now claimed survived the grant of the tidelands from Mexico, it could and should have been advanced before the patent issued. The present attempt to revive that servitude comes a century too late.

C. The Equal Footing Doctrine Granted no Tidelands Easement to California

As we have already noted, it is well established that the Equal Footing Doctrine did not reserve to California any interest in tidelands which the United States confirmed to private grantees in compliance with earlier treaty obligations. See, *supra*, p. 16. But even if—contrary to all that has been said—some landed easement survived the grant confirmation proceedings, it may be doubted whether any such interest passed to California.

1. So far as we are aware, there is no precedent for that result. Traditionally, the Equal Footing Doctrine has been held to effect a transfer to the State of the whole title to tidal water bottoms. *E.g.*, *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845). It does not follow, however, that any lesser interest in tidelands is likewise embraced by the constitutional doctrine. So far as the easement claimed is related to navigational concerns, it would seem to merge in the federal navigation servitude, an aspect of the power and responsibility confided to the Nation itself by the Commerce Clause of the Constitution which has not been relinquished to the States. See *Montana* v. *United States*, 450 U.S. 544, 551 (1981); *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374, 375-376 (1977). And, to the extent that California is asserting a sovereign prerogative to control land use or the appropriation of water, that is merely an incident of the police power unrelated to State title under the *Pollard* rule.

What is more, it is very questionable whether the Equal Footing Doctrine reached the lagoon, as it existed

at statehood.[27] Although the *Pollard* rule embraces the "shores," or tidelands, of navigable water bodies, it is far from clear that this principle extends to the shores of a discrete non-navigable body of water which, although affected by the tide, is only tenuously connected to the sea or a navigable arm of the sea. See *San Francisco* v. *Le Roy*, *supra*, 138 U.S. at 671-672. Indeed, it appears that, at trial, the City of Los Angeles expressly conceded that Ballona Lagoon did not qualify under the Equal Footing Doctrine. Clerk's Transcript on Appeal at 986.[28]

In sum, we challenge the easy assumption indulged by the court below that any interest retained by the United States was automatically passed on to the State.

2. Finally, we stress again that nothing said is intended to imply that either the Treaty with Mexico or the patent issued under the Act of 1851 can defeat the

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[27] It may be that substantial portions of the area to which the public easement is said to have attached would have qualified as "swamp and overflowed lands" under the Act of Sept. 28, 1850, *supra*. But, again, that grant reached only unappropriated lands of the United States, not lands embraced by Mexican grants confirmed under the 1851 Act. See, *e.g.*, *United States* v. *O'Donnell*, *supra*. We know of no authority construing the Swamp Lands Act as transferring to the State an easement over private lands.

Nor does the Submerged Lands Act, 43 U.S.C. (& Supp. V) 1301 *et seq.*, support respondents. That statute expressly excepts from the grant to the States previously alienated unsurveyed stream beds (43 U.S.C. 1301(f)), an exemption which may be taken also to embrace tidelands like those involved here. At all events, neither the Act nor the Equal Footing Doctrine preserves a State interest (assuming it ever attached) in former tidelands that have since become uplands, whether as a result of natural or artificial accretion or reliction. *California ex rel. Lands Commission* v. *United States*, No. 89, Orig. (June 18, 1982), slip op. 12 n.14; see 43 U.S.C. 1301(a)(1)-(2), construed in 42 Op. Att'y Gen. 241, 262 (1963).

[28] We refer to a supplemental memorandum filed March 5, 1979, in which counsel for Los Angeles stated: "Therefore, the City can, and does, admit that the waters of the Ballona Lagoon do not meet the federal definition for the purpose of navigability * * * [as set forth] in *Utah* v. *United States*, [403 U.S. 9 (1971)]—an Equal Footing case.

legislative power of the federal or State governments, within constitutional limitations, to restrict the uses of the granted lands in the public interest. Thus, to the extent that Ballona Lagoon is today actually or potentially a navigable waterway for interstate or international commerce, it is fully subject to the exercise of the federal navigational servitude, even though no interest in the underlying lands has been reserved. *E.g.*, *Appleby* v. *City of New York*, *supra*, 271 U.S. at 401; *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U.S. 82, 87-88 (1913). Nor is Congressional power under the Commerce Clause limited to strictly navigable waters which qualify as free public highways. See *Kaiser Aetna* v. *United States*, 444 U.S. 164, 170-174 (1979). Indeed, there are today many federal environmental protection programs that would bear on the area in question, whether it is properly viewed as navigable water, or tidelands or wetlands. *E.g.*, Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401, 403, 404, 406, 407; Clean Water Act of 1977, 33 U.S.C. (& Supp. V) 1342, 1344; Coastal Zone Management Improvement Act of 1980, 16 U.S.C. (& Supp. V) 1451 *et seq.*

By the same token, we are not remotely suggesting that Mexican grant lands are uniquely immune from legitimate regulation by the State in the exercise of its police power. Indeed, it may well be that, regardless of any reserved "public trust" interest, existing California law substantially protects the subsisting lagoon area. See, *e.g.*, Cal. Pub. Res. Code §§ 5810-5817, 30300 *et seq.* (West 1977 & Cum. Pocket Part 1983); Cal. Water Code §§ 13370-13381 (West Cum. Pocket Part 1983). Such regulation does not depend upon recognition of any proprietary easement withheld by the Republic of Mexico and passed on to the State. Cf. *Sporhase* v. *Nebraska ex rel. Douglas*, No. 81-613 (July 2, 1982), slip op. 8-9.[29] Nor are Cali-

[29] See generally Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. Fla. L. Rev. 561 (1982).

fornia's municipalities powerless to prevent development that adversely affects the public interest. See, *e.g.*, *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621 (1981).

In sum, our disagreement with the decision below is primarily focused on the means, rather than the end. But if we rightly understand the implications of the principle invoked, that is not an insignificant objection. At all events, here California has successfully asserted something more than a governmental power to protect existing tidelands in the public interest. What has been adjudicated to the State is a property interest in the land, said to have been reserved by Mexico, conveyed to the United States and, finally, transferred to the State in 1850. This claim in no way derives from California's sovereign prerogatives and cannot be sustained by any appeal to State property law, whether declared in the usual way by legislative action or "discovered" as an aspect of the "common law" by California's courts.

CONCLUSION

For the foregoing reasons, the judgment of the California Supreme Court should be reversed.

Respectfully submitted.

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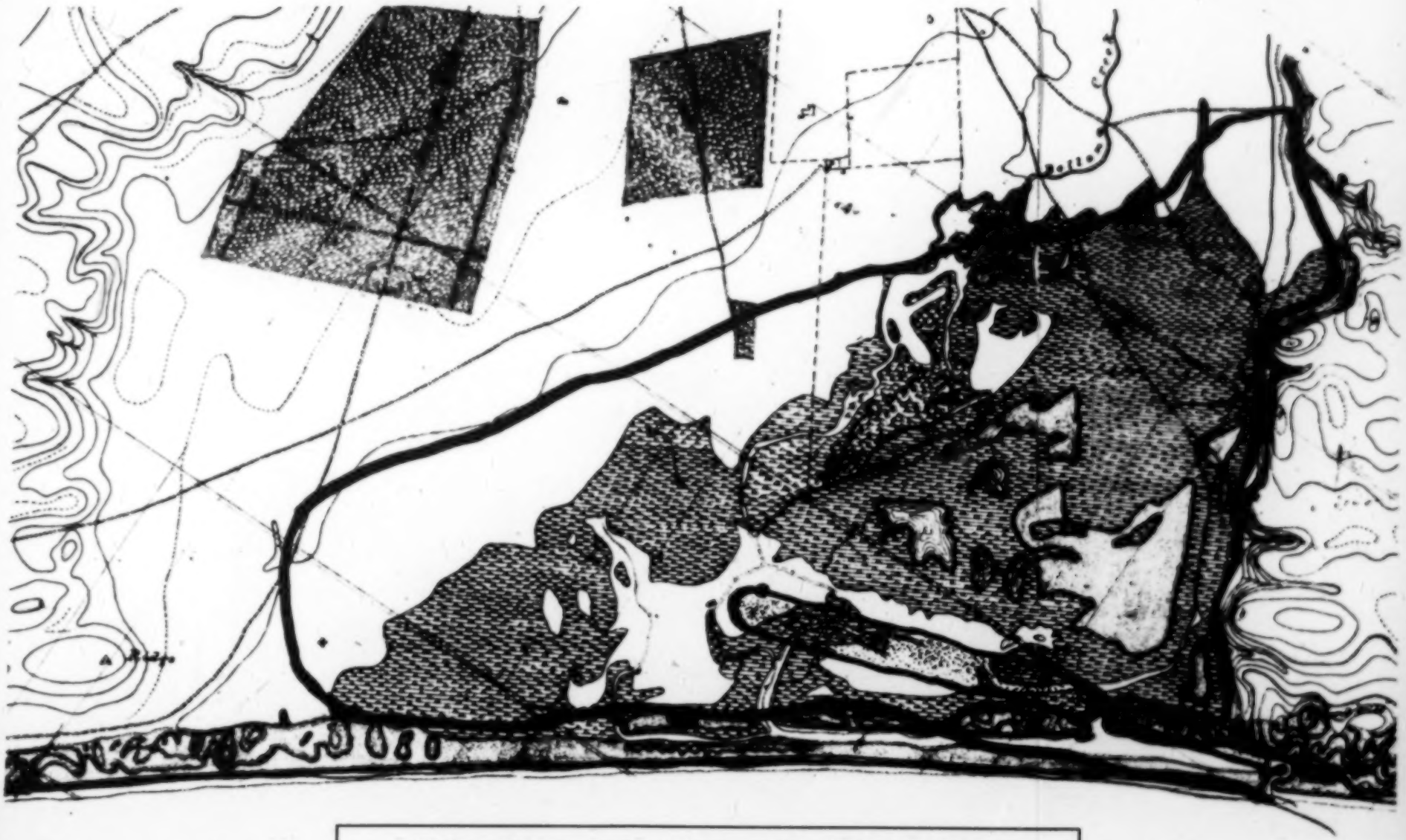

Outline of "Inner Bay" as Shown on Hancock Survey of 1858
Superimposed on 1876 United States Coast Survey Map